

STATE OF MICHIGAN
COURT OF APPEALS

HELEN CARGAS, Individually and as Personal
Representative of the Estate of PERRY CARGAS,

UNPUBLISHED
January 9, 2007

Plaintiff-Appellant,

v

GLENN BEDNARSH and MICHAEL ESSHAKI,
d/b/a MEL'S DINER,

Nos. 263869 and 263870
Oakland Circuit Court
LC No. 01-007603-AV

Defendants-Appellees.

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as on leave granted the circuit court order denying her motion for appellate attorney fees. We affirm.

I. Facts and Procedural History

Plaintiff originally filed suit against defendants, her tenants, in the 46th District Court alleging various breaches of the parties' commercial lease agreement. The district court ruled in plaintiff's favor. Plaintiff sought to recover her attorney fees pursuant to the parties' lease, which required defendants to repay plaintiff for "all expenses incurred" as a result of a breach of the agreement. Rather than awarding plaintiff's "actual attorney fees" as contemplated by the plain language of the agreement, the district court ordered defendants to pay plaintiff \$5,000 in "reasonable" attorney fees. Plaintiff appealed that decision to the Oakland Circuit Court. The circuit court agreed with plaintiff and ultimately ordered defendants to remit almost \$50,000 in attorney fees "incurred in the proceedings before the 46th District Court" Defendants appealed that order to this Court and argued that plaintiff was only entitled to "reasonable" attorney fees. See *Estate of Cargas v Bednarsh*, unpublished memorandum opinion of the Court of Appeals, issued July 24, 3003 (Docket No. 239421) (*Cargas I*). This Court affirmed the circuit court's order:

To be sure, where a contract provides for the recovery of "attorney fees" or "legal fees," without more, we will construe that language to mean reasonable attorney fees. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195-196; 555 NW2d 733 (1996); *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 299; 386 NW2d 177 (1986). However, where, as here,

the contract language plainly and unambiguously provides for the recovery of “actual attorneys [sic] fees,” we must simply enforce the contract language as written. See *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). Consequently, defendants’ contention of error is without merit. [*Cargas I*, *supra* slip op at 2.]

On remand to the circuit court, plaintiff also sought to recover the attorney fees incurred during her appeals to the circuit court and to this Court. Plaintiff contended that the circuit court was bound by the law of the case doctrine to award appellate attorney fees pursuant to this Court’s decision in *Cargas I*. Plaintiff also argued that the circuit court was required to award appellate attorney fees under the plain language of the commercial lease agreement. The circuit court disagreed and denied plaintiff’s motion.

This Court originally denied plaintiff’s applications for leave to appeal. *Cargas v Bednarsh*, unpublished order of the Court of Appeals, entered July 30, 2004 (Docket No. 254742); *Cargas v Bednarsh*, unpublished order of the Court of Appeals, entered August 6, 2004 (Docket No. 254718). Plaintiff filed an application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded to this Court for consideration as on leave granted. *Cargas v Bednarsh*, 473 Mich 860; 701 NW2d 136 (2005). This Court consolidated the two appeals on its own motion. *Cargas v Bednarsh*, unpublished order of the Court of Appeals, entered August 11, 2005 (Docket Nos. 263869 & 263870).

II. Standard of Review

We generally review a trial court’s decision with respect to a motion for attorney fees for an abuse of discretion. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). In this case, plaintiff seeks to recover attorney fees under the commercial lease. We review de novo the proper interpretation of a contract or the legal effect of a contractual clause. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). We also review de novo the applicability of the law of the case doctrine. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

III. Analysis

A. Law of the Case

Both plaintiff and defendant Bednarsh contend that the circuit court was bound by the law of the case doctrine to enter an order consistent with their arguments. Plaintiff contends that *Cargas I* required the imposition of all actual attorney fees, including those incurred during the appellate phase of these proceedings. Bednarsh, on the other hand, contends that the circuit court was prohibited from awarding appellate attorney fees because they were not expressly included in *Cargas I*, and because *Cargas I* affirmed the circuit court’s order awarding attorney fees incurred during the district court proceedings alone.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Thus, a question of law decided by an appellate court will not be

decided differently on remand or in a subsequent appeal in the same case. *Id.* The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). [*Ashker, supra* at 13.]

In *Cargas I*, this Court affirmed the circuit court's order holding that plaintiff was entitled to "actual attorney fees." That circuit court order expressly stated that plaintiff was entitled to "actual attorney fees incurred in the proceedings before the 46th District Court." The law of the case doctrine applies to issues that were actually decided in the appellate court, "either implicitly or explicitly." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). This Court did not expressly restate the circuit court's order. However, it can be implied from the procedural history that *Cargas I* did nothing more than affirm the order awarding attorney fees incurred during the district court proceedings alone. Therefore, we agree that the circuit court was not required under the law of the case doctrine to award appellate attorney fees. However, just as *Cargas I* did not expressly award those fees, it also did not expressly forbid the circuit court from considering such an award. In any event, as will be discussed *infra*, we agree with the circuit court's denial of plaintiff's motion.

B. Language of the Commercial Lease

Plaintiff contends that the circuit court was bound by the plain language of the commercial lease to award actual appellate attorney fees. The goal of contract interpretation is to give effect to the intentions of the contracting parties. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2005). When interpreting a contract, we must "give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory, supra* at 464. When the language of a contract is plain and unambiguous, the court must apply the contract as written. *Grosse Pointe Park, supra* at 198. When the contract language is ambiguous, the court may consider extrinsic evidence and oral testimony to determine the parties' intentions. *Id.*

The relevant language of the commercial lease provided that plaintiff may recover actual attorney fees as follows:

If suit is brought to recover possession of the premises, to recover any rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant that Lessee was to keep or perform, and a breach is established, then Lessee shall pay to the Lessor all expenses incurred, *including actual attorney fees*, which shall be deemed to have been incurred, including actual attorney fees, [sic] which shall be deemed to have been incurred on the commencement of the default and *shall be enforceable whether or not the action is prosecuted to judgment*. [Emphasis added.]

Bednarsh contends that plaintiff's entitlement to attorney fees extended only through the entry of a judgment, or other means of concluding the lawsuit. Bednarsh bases this interpretation on the use of the word "judgment" in the contractual provision and contends that the use of that word evinces the parties' intent to limit recovery to the trial phase. The commercial lease does not expressly specify whether plaintiff's entitlement to attorney fees is limited to the trial phase.

Inserting an omitted term into a contract, such as the exclusion of appellate attorney fees from plaintiff's remedies, is itself an act of contract interpretation and the court must decide whether the contracting parties intended for the omitted term to be included. See *Rowe v Montgomery Ward & Co*, 437 Mich 627, 669-670; 473 NW2d 268 (1991).

The contract language cited indicates that plaintiff would be entitled to her attorney fees in an enumerated legal action¹ regardless of whether the parties amicably settled or more informally resolved their dispute, even if the action did not proceed through trial and judgment. In any case, a plaintiff may be required to seek appellate relief to enforce his or her contractual rights. Under the contract, such appellate attorney fees would be part of "all expenses incurred" to adjudicate one of the enumerated situations. In this case, however, the appellate attorney fees were not incurred to secure the defendant tenants' removal from plaintiff's property. Rather, these expenses were incurred only to collect attorney fees.

We find *DeWald v Isola (After Remand)*, 188 Mich App 697; 470 NW2d 505 (1991), to be instructive. The defendants in *DeWald* originally appealed to this Court when the trial court denied their motion for sanctions against the plaintiff for filing a frivolous lawsuit. *Id.* at 698. This Court initially remanded to the trial court for the imposition of sanctions. On remand to the trial court, however, the defendants also sought the imposition of those costs and attorney fees incurred during their appeal to this Court, a motion that the trial court denied. *Id.* This Court affirmed the trial court's denial of appellate attorney fees. In so doing, this Court noted that appellate attorney fees and costs would be recoverable in a case where the appellate process was itself vexatious or a continuation of the frivolous lawsuit. *Id.* at 700-702. However, the mere fact that the appeal would not have occurred but for the initial filing of the frivolous lawsuit was too tenuous a connection to impose appellate attorney fees and costs under the statutes and court rules. *Id.* at 701, citing *Cooter & Gell v Hartmarx Corp*, 496 US 384, 406-407; 110 S Ct 2447; 110 L Ed 2d 359 (1990).

In *DeWald*, *supra* at 702-703, the costs incurred by the defendants at trial were directly related to the filing of the frivolous lawsuit and, therefore, were recoverable by the defendants as sanctions. The defendants did not appeal the trial court's ruling on the substantive issue in the case. Rather, the defendants appealed the trial court's order regarding their motion for sanctions. Accordingly, the appeal was separate from the substance of the lawsuit. The appeal related only to a post-judgment action of the trial court. *Id.*

Similarly, in this case, plaintiff did not appeal the district court's judgment regarding defendants' breach of contract. Rather, plaintiff appealed the district court's order regarding attorney fees to the circuit court. The remaining proceedings in this case all related to the award of attorney fees, not to the original suit "to recover possession of the premises, to recover any rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant that Lessee was to keep or perform" Accordingly, as in *DeWald*, the

¹ Under the lease, those actions included actions to recover possession, actions to recover rent or other monies due or action as a result of a breach of a covenant.

connection between the appellate proceedings and the substantive action is too tenuous to support an award of appellate attorney fees in the present matter.

C. Alternative Grounds for Affirmance

On appeal, Bednarsh raises alternative grounds for affirming the circuit court's denial of plaintiff's motion for appellate attorney fees. Bednarsh first contends that plaintiff abandoned her claim for appellate attorney fees because she failed to cite any legal authority in support of her motion. However, contrary to Bednarsh's assertion, plaintiff's motion for appellate attorney fees was based on this Court's opinion in *Cargas I* and on the applicable language of the commercial lease. There was no need for plaintiff to cite further authority to support her request, and therefore plaintiff did not abandon her claim as suggested by Bednarsh.

Bednarsh also contends that plaintiff was precluded from seeking appellate attorney fees because she had prepared the circuit court's previous orders specifically limiting her recovery to fees incurred during the district court proceedings alone. We agree, and conclude that plaintiff is both equitably estopped from changing her position, and collaterally estopped from seeking relief that was not requested below.

“Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.” *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999), quoting *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994). Our Supreme Court has also noted that equitable estoppel may be used “to prevent a party from contradicting a position taken in a prior judicial proceeding.” *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 372; 508 NW2d 464 (1993), quoting *Edwards v Aetna Life Ins Co*, 690 F2d 595, 598 (CA 6, 1982).

The principle of collateral estoppel is related but distinct. Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, (2) the same parties must have had a full and fair opportunity to litigate the issue, and (3) there must be mutuality of estoppel. *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Under the principle of mutuality of estoppel, in order for a party to estop an adversary from relitigating an issue, that party must have been a party or privy to the previous action. *Monat v State Farm Ins Co*, 469 Mich 679, 684-685; 677 NW2d 843 (2004).

In this case, the orders prepared by plaintiff's counsel specifically limited plaintiff's recovery to those attorney fees incurred during the district court proceedings. Plaintiff is now equitably estopped from contradicting those orders and attempting to seek further relief. Furthermore, plaintiff is collaterally estopped from seeking appellate attorney fees. Plaintiff never stated her intent to seek appellate attorney fees in her original appeal to the circuit court. The case proceeded to a final order in relation to attorney fees without plaintiff ever requesting, or submitting documentation of, her appellate attorney fees. At that point, the case reached a final judgment. The parties were clearly given adequate opportunity to raise their issues below, and Bednarsh was certainly bound by the circuit court's order mandating that he pay plaintiff's district court attorney fees. Plaintiff may not now change her position, and may not seek

different and additional relief that she could have sought—but did not seek—in the previous proceedings below.

D. Sanctions

On appeal, Bednarsh also contends that plaintiff should have been sanctioned under MCR 2.114 for requesting “exaggerated and grossly excessive” attorney fees. Although Bednarsh raised this argument before the circuit court, the circuit court made no ruling in this regard. Because Bednarsh failed to file a cross appeal concerning this argument pursuant to MCR 7.207, we are precluded from considering his challenge to the circuit court’s failure to impose sanctions against plaintiff. *Barnell v Taubman Co*, 203 Mich App 110, 123; 512 NW2d 13 (1993). Moreover, Bednarsh has not suggested that this Court should sanction plaintiff for filing a vexatious appeal.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer